IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. _____

STATE OF OHIO, ex rel. DAVID KING,

Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

ALLEN BROWN,
311 Atlas Bank Bldg.,
Cincinnati 2, Ohio,
Counsel for Appellant

August, 1960.

THE JOHNSON & HARDIN CO. LAW PRINTERS
CINCINNATI, OHIO

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STATE OF OHIO, EX REL. DAVID KING,

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v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Appellant, David King, submits the following statement in support of his contention that the federal constitutional questions presented herein are substantial and there is sufficient basis to invoke the jurisdiction of this Court to review on appeal the judgment and order of the Supreme Court of Ohio in Case No. 36219 before it, refusing to review the constitutionality of Cincinnati Municipal Ordinance No. 901-i3, and to allow ancillary action to prevent an unconstitutional exercise of power by the Municipal Court of Cincinnati, Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 170 Ohio State 393. A copy of this opinion is

reprinted herein as Appendix "A." The original trial court in the action of prohibition, the Court of Appeals for Hamilton County, Ohio, rendered no written opinion, although it did promulgate "Findings of Fact Found Separately from Conclusions of Law." Since the Supreme Court of Ohio has fully synopsized the findings of fact and has quoted in full the conclusions of law contained therein in the body of its opinion, reprinted herein as Appendix "A," the same is not reprinted herein. The Judgment Entry of the Supreme Court of Ohio and the entry of that Court denying Appellant's application for rehearing are attached hereto as Appendix "B."

JURISDICTION

These proceedings were originally initiated by the filing of an action in prohibition in the Court of Appeals for Hamilton County, Ohio, wherein the relator Appellant, David King, sought a writ of prohibition against Raymond E. Shannon, Presiding Judge of the Cincinnati Municipal Court, respondent-appellee, to prevent the carrying into execution a sentence imposed on relator after he was charged, tried and found guilty in the Municipal Court of a violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati, Ohio.

The ordinance under which the appellant was originally convicted, Cincinnati Municipal Ordinance Number 901-i3, reads in its entirety as follows:

> "Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or

stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than one hundred ($100.00) dollars, or imprisoned not more than (60) days, or both."

The original criminal action was tried to the Court, Judge Ralph Kohnen, a jury having been waived. During the course of said trial, then counsel for the defendant, made no objection to the jurisdiction of the Municipal Court or the constitutionality of the ordinance being enforced because of either the conflict of the Municipal Ordinance with Ohio Revised Code Section 2905.34 or the complete absence of the element of scienter from the ordinance. Following conviction on an affidavit and a record both silent on the element of knowledge, the Court imposed sentence of sixty days in jail and a fine of one hundred dollars and costs. A stay of execution was granted, pending an appeal. During the course of appeal, Judge Kohnen resigned from the Municipal Court of Cincinnati, and his unexecuted duties were assumed by the respondent as Presiding Judge of said Municipal Court.

The Defendant appealed to the Court of Common Pleas of Hamilton County, Ohio and upon affirmance therein, to the Court of Appeals of Hamilton County, Ohio. In neither court was the appeal in any manner predicated upon nor did it either directly or inferentially refer to the issues of jurisdiction or the unconstitutionality of the removal of the element of scienter from an ordinance dealing with books, or the possible conflict of the municipal misdemeanor ordinance with the State felony statute. The Court of Appeals affirmed the Court of Common Pleas. Further appeal was carried to the Supreme Court of Ohio. The notice of appeal still raised none of the foregoing critical issues.

The Supreme Court of Ohio denied appeal of right *specifically because constitutional issues had not been raised at any point.* It issued a mandate to carry its judgment into effect. (*City of Cincinnati* v. *King,* 169 O. S. 107, 157 N. E. 2d 431.)

Pending receipt of this mandate, present counsel was retained. The relator, through new counsel, orally requested a further stay of execution of the Municipal Court, pending submission and consideration of the constitutional issues, going to the very jurisdiction of the court. This was refused and the present action in prohibition was instituted in the Court of Appeals of Hamilton County, Ohio. Said Court denied the Writ of Prohibition after the adduction of the foregoing evidence. Motion for a new trial was denied, and appeal carried to the Supreme Court of Ohio. Judgment Entry affirming the ruling of the Court of Appeals was entered on March 16, 1960 (Appendix "B"). The appellant filed application for rehearing, which was denied by Entry of the Court on April 13, 1960 (Appendix "B"). Notice of Appeal to the United States Supreme Court was filed in the Supreme Court of Ohio on June 9, 1960 (See Appendix "D"). On August 1, 1960, the Supreme Court of Ohio granted thirty additional days in which to perfect appeal, under authority of Rule 13, Subparagraph 1 of the rules of this Court.

The jurisdiction of the Supreme Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257(2). The case however, presents several federal questions. Basically, the proceeding is grounded in a federal constitutional attack on a municipal ordinance and is reviewable by appeal. The element, however, of the refusal of the Supreme Court of Ohio to entertain such question of constitutionality in a proper ancillary proceeding, also indicates certiorari as remedy, the defendant being deprived of rights without due process of law in violation

of the 14th amendment to the Constitution of the United States. The Court is respectfully sought to consider this element as well as the direct issue in the nature of appeal under authority of 28 U. S. C. 2103, *Flournoy* v. *Wiener*, 321 U. S. 253, *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530 and *Cantwell* v. *Connecticut*, 309 U. S. 626, 310 U. S. 296.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Smith* v. *California*, 28 U. S. Law Week 4033; *Powell* v. *Alabama*, 287 U. S. 45; *Brown et al.* v. *State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461; *Honeyman* v. *Hanan*, 302 U. S. 375, 58 S. Ct. 273; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hill* v. *Sanford*, 131 F. 2d 417; *Dreyer* v. *Pease*, 20 S. Ct. 1025, 176 U. S. 681.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is Section 901-i3 of the Code of Ordinances of the City of Cincinnati unconstitutional as an unreasonable constraint upon freedom of press in that it imposes criminal liability for mere unknowing possession of obscene literature, in violation of the 1st Amendment to the Constitution of the United States?

2. If Section 901-i3 is so unconstitutional, is any conviction for violation thereof a nullity, and imposition of sentence thereon subject to prohibition?

3. Is the position of the Supreme Court of Ohio, to the effect that if a constitutional question is not raised in the original trial of a criminal action, the accused is forever barred from asserting the same, even in a proper ancillary proceeding to test the constitutionality of the enforced ordinance and the basic jurisdiction of the Court to act under the force thereof, a violation of due process of law and of the accused of his rights under the 14th Amendment of the United States Constitution?

STATEMENT OF THE CASE

The facts of the case have been stated under the caption of *Jurisdiction* foregoing. Emphasis is again made of the silence of the record of the original criminal trial on the element of knowledge, and of course the complete absence of said element in the ordinance under which the original conviction was obtained. These issues were never raised in the original trial and appeal. Thereafter the original court refused to entertain consideration of the constitutional issues engendered by such circumstances and an *entirely new* action in prohibition was instituted. This is an appeal from that entirely new action, in which the constitutional issues were not only raised in the original instance but were indeed the very basis of the cause of action. The record thus speaks for itself on the preservation of the Federal issues in *this action*. Emphasis of this may be seen from reading the opinion of the Court (Appendix "A") and the motion for a rehearing filed in response thereto (Appendix "E").

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are so substantial as to require plenary consideration by this Court with briefs on the merits and oral arguments for their resolution. Each question presented involves constitutional principles which affect the basic rights of the appellant herein and all citizens of the United States.

The Cincinnati Ordinance in question goes far beyond the California law struck down in *Smith* v. *California* (23 U. S. Law Week 4033). It takes the element of knowledge out of possession of obscene literature under any and all circumstances whatsoever. Thus not only is the dealer hamstrung; anyone who handles a book does so at his peril. Not only is commerce in books encumbered, but any picking up to peruse by anyone, any exploration into

contents by anyone becomes an act of courting a misdemeanor, the crime committed by the very act of study, perhaps the very exercise of conscience. It is patently unconstitutional.

But a critical issue for constitutional determination remains in addition in this case. The defendant did not assert that patent unconstitutionality in his original trial. When his then counsel began to become conscious of the constitutional issues involved and to hint of their existence, the Supreme Court of Ohio refused to entertain him in discussion of the same but ruled on his appeal as of right that it was to be dismissed "for the reason that no constitutional question was raised in the lower courts." (*City of Cincinnati* v. *King*, 169 Ohio St. 107, 157 N. E. 2d 431.) The original trial tribunal was then asked to consider the constitutional issues and declined. The action in prohibition followed. Then here in a direct attack on the power of the court to act under an unconstitutional ordinance, on a matter which could not be a crime because of constitutional protection, the Supreme Court hearkened back to the original failure to plead the same in the criminal action and in effect promulgated a doctrine that laches of a defendant can breathe vitality in an ultra-vires exercise of power by a court.

The weight of authority supports a rule that a court may, on a proper ancillary proceeding, inquire into the constitutionality of a statute or ordinance under which the petitioner has been convicted and if the statute proves to be unconstitutional, the petitioner must be discharged (Annotations 32 A. L. R. 1054). On the other hand, Ohio has consistently clung to a minority view that a judgment of conviction in a criminal court having jurisdiction of the offense, is not void, because of the invalidity of the ordinance or statute under which the conviction may have been had and that ancillary relief is not available (*Yutze*

v. *Copelan*, 109 O. S. 171, 32 A. L. R. 1048, 142 N. E. 33). The courts adhereing to the first rule base is upon the conclusion that if a statute or ordinance is unconstitutional the trial court is entirely without jurisdiction. If this view obtains, Ohio is clearly abusing due process by having the silence of a defendant vest jurisdiction where no constitutional basis of exercise of power exists. Thus the issue of whether the minority view denying the right to seek by writ of habeas corpus or other ancillary petition a determination of whether the accused was convicted under a de jure statute, unless such issue was made in the original trial, is, in and of itself, a denial of due process of law clearly presents itself in the present cause.

But an even stronger issue of due process presents itself. Even in clinging to the minority view, as though the silence of the accused could vest plenary powers, Ohio admits the original trial tribunal must have had "jurisdiction of the offense." (*Yutze* v. *Coplan*, 109 O. S. 171, 32 A. L. R. 1048, 142 N. E. 33.) What then here, were there could be no "offense" by constitutional privilege granted in the 1st amendment made binding upon the states by the 14th amendment? Unknowing possession cannot be an offense against law by effect of constitutional privilege. Thus the original trial tribunal was acting without a color of right, and Ohio puts the burden of assertion of this on the accused in the original and single instance of a first trial, or else his laches has invested a power in the Court, not derived to it by force of law. It seems imperative that the Supreme Court of the United States rule on whether this constitutes due process of law under a constitutional system.

CONCLUSION

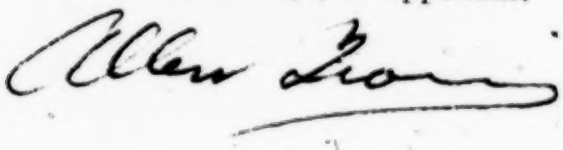
The refusal of the Supreme Court of Ohio to undertake consideration of constitutionality in a proper ancillary

attack upon an ordinance in which even unknowing possession of obscene books by anyone under any circumstances is made subject to criminal conviction raises serious questions of whether Ohio courts are in such instance acting within the constraints imposed upon them by the 14th amendment to the Constitution of the United States.

Respectfully submitted,

ALLEN BROWN,

Attorney for Appellant.



APPENDIX "A"

Opinion of the Supreme Court of Ohio

THE STATE, EX REL. KING, APPELLANT, *v.* SHANNON, PRESIDING JUDGE, APPELLEE.

170 Ohio State 393

Criminal law—Violation of municipal ordinance prohibiting possession of obscene literature—Conviction and sentence—Affirmance by appellate court—Constitutionality of ordinance not raised in lower court—Prohibition to prevent execution of sentence denied.

(No. 36219—Decided March 16, 1960)

APPEAL from the Court of Appeals of Hamilton County. The facts are stated in the opinion.

Mr. Allen Brown, for appellant.

Mr. James W. Farrell, Jr., city solicitor, and *Mr. Lyle W. Castle*, for appellee.

Per Curiam. This is an action in prohibition instituted in the Court of Appeals for Hamilton County, wherein David King, relator, seeks a writ of prohibition against Raymond E. Shannon, Presiding Judge of the Cincinnati Municipal Court, respondent, to prevent the carrying into execution of the sentence imposed on relator after he was charged, tried and found guilty in the Municipal Court of a violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati. The Court of Appeals dismissed the petition, and the cause is now in this court for determination on an appeal as of right.

Section 901-i3 reads as follows:

> "Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image, cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, cir

cular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than one hundred ($100) dollars, or imprisoned not more than sixty (60) days, or both."

Relator was sentenced to 60 days in jail and fined $100. He thereupon appealed to the Court of Common Pleas where the judgment below was affirmed. On appeal to the Court of Appeals, the judgment of the Court of Common Pleas was affirmed, and relator then filed a motion to certify the record and an appeal as of right in this court where for the first time the constitutionality of the Cincinnati ordinance under which he was convicted was challenged. His motion to certify was overruled and his appeal as of right dismissed "for the reason that no constitutional question was raised in the lower courts." (169 Ohio St. 107, 157 N. E. [2d] 431.)

It is an established rule of long standing in this state that a constitutional question, either in a civil or criminal action, can not be raised in the Supreme Court unless it was presented and urged in the courts below. *Hoffman* v. *Staley*, 92 Ohio St. 505, 112 N. E. 1084; *Cuthbertson* v. *State*, 106 Ohio St. 658, 140 N. E. 941; *Zimmerman* v. *Morris Plan Bank of Cleveland*, 113 Ohio St. 703, 150 N. E. 920; and *Village of Clarington* v. *Althar*, 122 Ohio St. 608, 174 N. E. 251.

And the general rule is that the "validity of a municipal ordinance can not be questioned on review unless first attacked in the court below." 24 Corpus Juris Secundum, 312, Criminal Law, Section 1676.

Appendix "A"

In this prohibition action, relator contends that Section 901-i3 of the ordinances, not requiring *scienter* and making the commission of an offense thereunder a misdemeanor, is in conflict with Section 2905.34, Revised Code, requiring *scienter* and making the same offense a felony, and is a nullity under the decision of this court in the case of *City of Cleveland* v. *Betts*, 168 Ohio St. 386, 154 N. E. (2d) 917. This contention comes too late. We find ourselves in substantial accord with the "conclusions of law" of the Court of Appeals herein, which states:

> "The statutes of Ohio having conferred jurisdiction on the Municipal Court of Cincinnati to hear violations of ordinances of the city of Cincinnati, Ohio, the said court having assumed such jurisdiction, and having found the relator guilty of a violation of city of Cincinnati ordinance No. 901-i3, and the judgment of the said Municipal Court having been affirmed by the Court of Common Pleas of Hamilton County, Ohio, this Court of Appeals and the Supreme Court of Ohio, which denied the relator his appeal as of right and his motion to certify the record, and only the performance of a ministerial act by the Municipal Court of Cincinnati remaining, this court finds that the writ of prohibition does not lie in this case." Compare *State (ex rel. Devine, Pros. Atty.)* v. *Harter, Judge*, 167 Ohio St. 51, 146 N. E. (2d) 437.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

WEYGANDT, C. J., ZIMMERMAN, TAFT, MATTHIAS, BELL, HERBERT and PECK, JJ., concur.

APPENDIX "B"

Copy of Entry of Supreme Court of Ohio Affirming Judgment of Court of Appeals of Hamilton County, Ohio

Journal 43, Page 404

THE SUPREME COURT OF THE STATE OF OHIO

No. 36219

The State of Ohio } January Term, A. D. 1960
City of Columbus } To-wit: Wednesday, March 16, 1960

STATE OF OHIO, EX REL. DAVID KING,

Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the Court of Appeals be, and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that appellee recover from the appellant his costs herein expended taxed at $———.

ORDERED, That a special mandate be sent to the Court of Appeals of Hamilton County, to carry this Judgment into Execution.

John W. McMillan, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Appendix "B"

Witness my hand and the seal of said Court this 23rd day of March A. D. 1960.

JOHN W. McMILLAN, *Clerk.*

* * * * * *

Journal 43, page 430. Entered April 13, 1960.

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is denied.

APPENDIX "C"

Cincinnati Municipal Ordinance No. 901-i3: Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image, cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than one hundred ($100.00) dollars, or imprisoned not more than sixty (60) days, or both.

Ohio Revised Code, Section 2905.34: No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted

to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.

APPENDIX "D"

Copy of Notice of Appeal to the Supreme Court of the United States

IN THE

SUPREME COURT OF OHIO

No. 36219

STATE OF OHIO, EX REL. DAVID KING,
Plaintiff-Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,
Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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1. Plaintiff-appellant in the within cause does hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Ohio, dated April 13, 1960, denying the application for rehearing of said Court's decision of March 16, 1960, in which said Court affirmed judgment of the Court of Appeals for Hamilton County, Ohio in dismissing the Petition of the Relator who sought a writ of prohibition against the defendant from imposing sentence under conviction of violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati upon the grounds that said ordinance was in violation of the Constitution of the United States.

This appeal is taken pursuant to 28 United States Code Annotated 1257(2) and 28 United States Code Annotated 1257(3). This is an action in prohibition instituted in the

Appendix "D"

Court of Appeals for Hamilton County, Ohio, wherein David King, Relator, sought a writ of prohibition against Raymond E. Shannon, Presiding Judge of the Cincinnati Municipal Court, Respondent, to prevent the carrying into execution of the sentence imposed on Relator after he was charged, tried and found guilty in the Municipal Court of the City of Cincinnati of a violation of Section 901-i3 of the Code of Ordinances of the City of Cincinnati. Section 901-i3 reads as follows:

> "Whoever shall print, engrave, sell, offer for sale, give away, exhibit or publish, or exhibit as for sale or other purpose, or have in his possession or under his control, any obscene, lewd, lascivious, indecent, or immodest book, pamphlet, paper, image, cast, statuary, drawing or representation, or any other article of an indecent or immoral nature, or book, paper, print, circular or writing made up principally of pictures or stories of immodest deeds, lust or crime, or shall exhibit upon the public street or highway, any of the articles or papers, prints, publications, as aforesaid, within the view of passerby upon said street or highway, shall be fined not more than One Hundred ($100.00) Dollars, or imprisoned not more than Sixty (60) days or both."

Relator was charged with mere possession, was found guilty and sentenced to sixty days in jail and fined $100.00. He thereupon appealed to the Court of Common Pleas, where the judgment below was affirmed. On appeal to the Court of Appeals, the judgment of the Court of Common Pleas was affirmed and Relator then filed a motion to certify the record and appeal as of right in the Supreme Court of Ohio, where for the first time then counsel for the Relator raised the Constitutionality of the Cincinnati Ordinance under which he was convicted. The Motion to Certify was overruled and the Appeal of Right was dismissed "for the

reason that no constitutional question was raised in the lower courts." (169 O. S. 107, 157 N. E. 2nd 431.) The Relator then initiated the current action for writ of prohibition and posted stay of execution bond on original sentence, which stay of execution is still in full force and effect. Court of Appeals dismissed the Petition and appeal was taken to the Supreme Court of Ohio. The Supreme Court of Ohio denied the Petition, as above set forth. The Court is petitioned to make any further order with respect to stay of execution bond to be given by said defendant in order to stay execution during the pendency of this appeal.

2. The Court will please prepare a transcript of all proceedings in the Supreme Court of Ohio in this cause, including the full proceeding of all lower courts certified to said Supreme Court, and include, but not limited to in said transcript the following:

Findings of fact and conclusions of law of Court of Appeals of Hamilton County, Ohio.

Notice of appeal and Assignments of Error, Supreme Court of Ohio.

Motion for Rehearing, Supreme Court of Ohio.

All briefs and other notices, motions and documents and entries filed in this cause before this Court.

3. Appellant adopts for his statement of points upon which he intends to rely in his Appeal to the Supreme Court of the United States, the following assignments of error.

(a) The Supreme Court of Ohio, erred in refusing to prohibit the imposition of sentence under conviction under an ordinance which is unconstitutional in the following respect to-wit:

> The omission of the element of scienter from the Municipal Ordinance forbidding the mere possession of obscene books renders the same in viola-

Appendix "D"

tion of the Constitution of the United States, First Amendment.

(b) The refusal of the Supreme Court of Ohio to review the constitutionality of the above ordinance in a proper ancillary proceeding where constitutionality was raised in the Court of original jurisdiction on the grounds that the constitutional question was not raised in the original trial tribunal is a deprivation of defendant's rights without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) By reason of the foregoing points upon which the appellant intends to rely in his appeal to the Supreme Court of the United States, the following questions are presented for appeal.

Is Section 901-i3 of the Code of Ordinances of the City of Cincinnati unconstitutional as an unreasonable constraint upon freedom of speech and press in that it imposes criminal liability for mere unknowing possession of obscene literature?

Is the position of the Supreme Court of Ohio to the effect that if the constitutional question is not raised in the original trial of a criminal action and it is forever barred even if properly raised in the original instance in a proper ancillary proceeding to test the constitutionality and the basic jurisdiction of the Court to act under an unconstitutional ordinance, a violation of due process of law and the Fourteenth Amendment of the United States Constitution?

/s/ ALLEN BROWN

Counsel for Plaintiff-Appellant

RECEIPT OF NOTICE

June 8, 1960

This is to acknowledge receipt of the above Notice of Appeal.

/s/ LYLE W. CASTLE

Counsel for Defendant-Appellee

APPENDIX "E"

IN THE
SUPREME COURT OF OHIO

No. 36219

STATE OF OHIO, ex rel. DAVID KING,

Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

APPLICATION FOR REHEARING

Comes now the appellant and makes application to the Court for rehearing in the within cause, upon the grounds set forth in the following memorandum, which is made a part hereof.

Respectfully submitted,

/s/ ALLEN BROWN,
Allen Brown, Attorney for Plaintiff-Appellant.

MEMORANDUM

The Court in its Per Curiam opinion has not discussed the effect upon the given case of *Smith* v. *California,* 28 U. S. Law Week 4033. This decision, which in effect rendered constitutionally invalid the Cincinnati Ordinance under which the appellant was tried and convicted, was later in time than the original trial and complete appeal of the appellant from the original conviction. It would there-

fore have been impossible for the legal effect of this decision to have been raised in the original trial and appeal unless then counsel for appellant had had clairvoyant powers.

However, a much more fundamental issue is developed by the opinion in this case. The Court first misinterprets the general rule laid down in *24 Corpus Juris Secundum 312* to wit: that the "validity of a municipal ordinance cannot be questioned on review unless first attacked in the Court below." This is a rule of *appellate procedure*. This rule does not and cannot apply in an ancillary proceeding where the *fundamental jurisdiction* of the Court to act is being attacked collaterally because of the basic unconstitutionality of the ordinance which the Court seeks to enforce.

In effect, from the face of its opinion, the Court has not given consideration to the proposition that depriving the appellant of the proper ancillary remedy to test the constitutionality of the ordinance when he has failed to do so in the original appeal, and only because he failed to do so in the original trial, is in itself a deprivation of his rights under due process of law.

The reluctance of appellate courts to consider in the self-same cause, issues not presented to the trial tribunal, is a just and proper position, but this arises basically from the fact that the appellate court is sitting in review of what the lower court did. But the transposition of a rule of review to a rule of determination in an ancillary proceeding where the issue is properly raised and considered by the original trial tribunal, is denying the right of appeal in a direct relationship and a deprivation of rights under the due process of law.

Further, since Courts are derivative of the power under law, the jurisdiction of a court, the legal propriety of its very capacity to act, is always subject to ancillary attack.

Appendix "E"

This proposition, in the given case, Ohio has foreclosed and a serious question remains as to whether the Ohio doctrine is in and of itself a violation of due process of law.

Respectfully submitted,

/s/ ALLEN BROWN

Allen Brown
Attorney for Plaintiff-Appellant

Copy mailed to opposing counsel March 28, 1960.

/s/ ALLEN BROWN

Allen Brown

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

STATE OF OHIO ex rel. DAVID KING,
Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,
Appellee.

Appeal from the Supreme Court of Ohio

PETITION FOR RE-HEARING OF ORDER DENYING APPEAL

ALLEN BROWN,
311 Atlas Bank Building,
Cincinnati 2, Ohio,
Counsel for Appellant.

November, 1950

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IN THE

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Appellant,

v.

RAYMOND E. SHANNON, Presiding Judge, Municipal Court of Cincinnati, Ohio,

Appellee.

Appeal from the Supreme Court of Ohio

PETITION FOR RE-HEARING OF ORDER DENYING APPEAL

Appellant, David King, prays that this Court grant rehearing of its order of November 7, 1960, denying appeal from the Supreme Court of Ohio, from its order in case number 36219 before it, issued April 13, 1960 affirming the judgment of the Court of Appeals, Hamilton County, Ohio denying writ of prohibition to prevent imposition of sentence under an unconstitutional ordinance and that appeal be granted to review the judgment of the Supreme Court of Ohio in the above entitled case as prayed for in the Jurisdictional Statement filed August 28, 1960 herein, upon the grounds set forth hereafter:

At the time of this Court's Order of November 7, 1960, the Court had not rendered its decision in the case of *C. G.*

Gomillion et al., Petitioners v. Phil M. Lightfoot, which decision was forthcoming on the 14th day of November, 1960, and is set forth in *29 U. S. Law Week (Supreme Court Edition) 1021.* In that decision, Justice Frankfurter, on behalf of the majority of the Court, stated as follows:

> "When a State exercises power wholly within the domain of State interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as instrument for circumventing a federally protected right. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify this imposition of an 'unconstitutional condition.'"

To apply this language to the instant case, the State of Ohio affords no mode whatsoever of review of constitutional validity of an *empowering* statute if said statute is not attacked by an individual defendant in the sole instance of original trial.

It might be sufficient for Ohio to deny on grounds of its own *any single* specific remedy to test the constitutionality of the subjugation of a course of federally protected conduct to criminal charges. But when it is revealed that Ohio forecloses *all* modes extraneous or posterior to the original trial, itself, then is not Ohio—to paraphrase—"exploiting a power acknowledged to be absolute" to the whole prevailment of an imposition of an "unconstitutional condition." (*Mooney* v. *Holohan*, 294 U. S. 103.)

It is respectfully submitted that Ohio, by its doctrine, laid down in *Yutze* v. *Copelan*, 109 O. S. 393, and the within cause affords no form of remedy for rectifying an unconditional condition once there has been even an unwitting failure to assert the same, or an intervening circumstance of substantial effect.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that re-hearing be granted, upon the grounds that Ohio's foreclosure of all modes of post-judgment attack upon an unconstitutional condition is a violation of the 14th Amendment.

Respectfully submitted,

ALLEN BROWN,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court, in this, to-wit: that the language of *Gomillion et al., Petitioners* v. *Phil M. Lightfoot* (29 U. S. Law Week, Sup. Ct. Ed. 4024), indicates the further enunciation of a doctrine and rationale which is an intervening circumstance of substantial effect and was not available to the petitioner for previous presentation in this case.

Counsel for Appellant.

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 363

OHIO ex rel. KING

v.

SHANNON, PRESIDING JUDGE, MUNICIPAL COURT OF CINCINNATI, OHIO.

Appeal from the Supreme Court of Ohio

Decided November 7, 1960.

PER CURIAM.

The appeal herein is dismissed for the reason that the judgment of the Supreme Court of the State of Ohio, sought here to be reviewed, is based upon a non-federal ground adequate to support it.